NO. 01-18-00538-CR

IN THE
COURT OF APPEALS FOR THE
FIRST JUDICIAL DISTRICT OF TEXAS
AT HOUSTON

RICARDO ROMANO

V.

STATE OF TEXAS

Appealed from the
County Criminal Court at Law No. 6
of Harris County, Texas
Cause Number 2167075

REPLY BRIEF FOR APPELLANT

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REPLY TO STATE'S RESPONSE TO FIRST POINT OF ERROR

THE EVIDENCE IS LEGALLY INSUFFICIENT TO SUSTAIN APPELLANT'S CONVICTION FOR INDECENT EXPOSURE BECAUSE THE CONTEMPORANEOUS VIDEO EVIDENCE INDISPUTABLY DEMONSTRATES THAT THE POLICE OFFICER DID NOT SEE APPELLANT COMMIT THE OFFENSE.

The State contends that the evidence is legally sufficient to support appellant's conviction for indecent exposure based on Sergeant Ryan Gardiner's testimony that he saw appellant masturbate when Gardiner was hiding in the bushes on horseback. The State disputes that the contemporaneous video recording from Gardiner's body camera (SX 2) contradicted his testimony because it was "not . . . conclusive" evidence, as it did not depict what occurred from the vantage point of Gardiner's eye-level. *State's Brief* at 9-11.

The State is flat wrong. The Court of Criminal Appeals has held that, when a "videotape presents indisputable visual evidence contradicting essential portions of [a police officer's] testimony," an appellate court must not defer to the trial court's explicit or implicit findings based on the officer's inconsistent testimony. Carmouche v. State, 10 S.W.3d 323, 332 (Tex. Crim. App. 2000) (declining to defer to trial court's ruling where indisputable visual evidence contradicted implied fact findings). See also Tucker v. State, 369 S.W.3d 179, 186 (Tex. Crim. App. 2012) (where testimony conflicted, court of appeals should have viewed video evidence to

determine whether totality of evidence supported trial court's ruling); id. at 187 (Alcala, J., concurring) (citing Carmouche, "when evidence is conclusive, such as a written and signed stipulation of evidence or 'indisputable visual evidence,' then any trial-court findings inconsistent with that conclusive evidence may be disregarded as unsupported by the record, even when that record is viewed in a light most favorable to the trial court's ruling.").

Although Carmouche and Tucker concerned a trial court's fact findings in the context of a pretrial motion to suppress evidence, their logic fully applies to an appellate court's review of whether legally sufficient evidence supports a conviction. See Love v. State, 73 N.E.3d 693, 695 (Ind. 2017) (citing Carmouche, "We hold that Indiana appellate courts reviewing the sufficiency of evidence must apply the same deferential standard of review to video evidence as to other evidence, unless the video evidence indisputably contradicts the trial court's findings."). Cf. Scott v. Harris, 550 U.S. 372, 378-81 (2007) (considering indisputable video evidence to reverse lower court's refusal to grant summary judgment for police officer in civil rights lawsuit; "Respondent's version of events is so utterly discredited by the record that no reasonable jury could have believed him. The Court of Appeals should not have relied on such visible fiction; it should have viewed the facts in the light depicted by the videotape.").

Gardiner's body camera video indisputably contradicts and, therefore, completely undermines the credibility of his testimony. The body camera was located on his chest, mere inches below his eye level. It offered an excellent, if not identical, depiction of his perspective. Furthermore, the video clearly demonstrates the limitations on his vantage point because of the bushes and trees that impeded his view of appellant.

The body camera also demonstrates the substantial distance between Gardiner and appellant during the incident. Although no evidence established the exact distance between them, this Court can make reasonable deductions from the record. The video (SX 2) shows Gardiner on his horse galloping at a high speed for 12 seconds—from 2:27 to 2:39—before he encountered appellant near the car. Assuming that the horse galloped—conservatively estimated at 25 miles per hour[1]—it traveled nearly 147 yards (440 feet) before it reached appellant.[2] Even if the horse cantered or loped—a three-beat gait slower than a gallup but faster than a trot—at a conservative 12 miles per hour, it traveled 70 yards (211 feet) before reaching

[1] Ordinary horses—other than professional race horses—typically run between 25-30 miles per hour. See, e.g., Speed of Animals: Horses, http://www.speedofanimals.com/animals/horse ("The gallop averages 40 to 48 kilometres [sic] per hour (25 to 30 mph).").

[2] A horse galloping 25 miles per hour for 12 seconds would travel nearly 37 feet per second, which is more than 12 yards per second, for a total of 147 yards over 12 seconds. (To convert a speed value from miles per hour to feet per second, multiply it by 5,280, then divide by 3,600.) See How to Covert Miles Per Hour to Feet Per Second, https://sciencing.com/convert-mph-feet-per-second-2306812.html.

appellant.[3] Gardiner admitted that he did not use his binoculars to watch appellant from the bushes (1 R.R. 33, 38-39). It was simply impossible that he could determine with his naked eye, particularly with a sight line obscured by bushes and tree branches, that appellant was masturbating from a distance of at least 70 yards and potentially more than 150 yards.

The video recording establishes two additional, relevant, indisputable facts. First, immediately after arresting appellant, Gardiner falsely asserted that he watched appellant from the bushes through his binoculars.[4] Because the video establishes that Gardiner could not see appellant masturbating, it appears that he made this false statement hoping that appellant would admit that he was masturbating when told that Gardiner saw him doing so through binoculars. But appellant made no such admission. Indeed, he denied masturbating. Gardiner's claim that he used binoculars also verifies how far he was from appellant. He would not have needed to assert that he used binoculars to watch appellant unless the bushes in which he hid were too far to watch appellant with the naked eye. Stated otherwise, Gardiner knew that appellant would not believe that he saw appellant masturbating from such

[3] Speed of Animals: Horses, http://www.speedofanimals.com/animals/horse ("the canter or lope (a three-beat gait that is 19 to 24 kilometres [sic] per hour (12 to 15 mph)").

[4] Gardiner's lie appears around 9:49 to 9:52 on the video recording (SX 2). He also admitted at trial that he falsely stated in his offense report that he watched appellant masturbate through his binoculars (1 R.R. 33).

a far distance unless appellant believed that Gardiner was using binoculars. It should not surprise this Court that Gardiner would lie to appellant about using binoculars where he also lied to the trial court that he could see appellant masturbating from the bushes. Thankfully, the video depicts the truth.

The second indisputable fact established by the video is that, after Gardiner lied about using binoculars, appellant asked *three times* to watch the video recording because it would exonerate him.[5] A guilty person who was told that he was video-recorded while committing a criminal act would not repeatedly insist that the arresting officer review the recording of the incident. Appellant's insistence that Gardiner watch the recording—despite being told falsely that Gardiner saw him masturbate through binoculars—is strong circumstantial evidence of his innocence.

The video recording flatly contradicts the State's only witness at trial and contains exculpatory evidence. This Court should conclude that the evidence is legally insufficient, reverse appellant's conviction, and issue an appellate acquittal.

[5] Appellant requested to see the video at about 9:53, 9:58, and 10:40 (SX 2).

CONCLUSION

This Court must set aside the judgment of conviction and issue an appellate acquittal or, alternatively, remand for a new trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I served a copy of this brief on Cory Stott, assistant district attorney for Harris County, by electronic service on April 14, 2019.

/S/ Josh Schaffer
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CERTIFICATE OF COMPLIANCE

I certify that, according to the word count of the computer program used to create this document, the countable portion contains 1,187 words.

/S/ Josh Schaffer
Josh Schaffer